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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-524

ALFRED E. AZHOCAR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Attorney for Petitioner
ALFRED E. AZHOCAR

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TOPICAL INDEX

	Page
TABLE OF AUTHORITIES	iii
PETITION FOR WRIT OF CERTIORARI	1
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	3
CONSTITUTIONAL PROVISIONS INVOLVED	4, 5
STATEMENT OF FACTS	5
REASONS FOR GRANTING THE WRIT	14
I	14
CERTIORARI SHOULD ISSUE WHERE THE COURT OF APPEALS HAS UTILIZED INCORRECT FACTS TO REACH A FINDING, AND IN SO DOING, HAS IMPROPERLY EXTENDED THE MOVING VEHICLE EXCEPTION TO SUSTAIN A WARRANTLESS SEARCH.	
II	31
A TRIAL COURT THAT STATES ITS PREDISPOSITION NOT TO BELIEVE AN ACCUSED WHO APPEARS BEFORE IT FOR THE FIRST TIME SHOULD NOT THERE-	

Page

AFTER PRESIDE OVER THE CASE. UNDER THE CIRCUMSTANCES, THE TRIAL JUDGE ERRED IN FAILING TO RECUSE HIMSELF RESULTING IN MANIFEST UNFAIRNESS TO PETITIONER.

CONCLUSION 44

APPENDIX A

OPINION

APPENDIX B

Order Denying Rehearing

TABLE OF AUTHORITIES

Cases Pages

Almeida-Sanchez v. United States, 433 U.S. 266 (9th Cir. 1973) 27

Berger v. United States, 255 U.S. 22 (1922) 42, 43

Cady v. Dombrowski, 413 U.S. 433 (1973) 25, 26

Carrol v. United States, 267 U.S. 132 (1924) 27

Chambers v. Maroney, 399 U.S. 42 (1970) 24, 25, 28

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 27

Davis v. Board of School Commissioners, 517 F.2d 1044 (5th Cir. 1975) 36

Harris v. United States, 390 U.S. 234 (1968) 27

In re Murchison, 349 U.S. 136 (1955) 37

Offutt v. United States, 348 U.S. 11 (1954) 38

Plazola v. United States, 291 F.2d 56 (9th Cir. 1961) 29

TABLE OF AUTHORITIES cont.

Cases	Pages
Preston v. United States, 376 U.S. 364 (1964)	25
Public Utilities Commission v. Pollak, 343 U.S. 451 (1952)	41
South Dakota v. Opperman, 428 U.S. 364 (1976)	26
Texas v. White, 423 U.S. 364 (1976)	26
United States v. Abascal, 564 F.2d 821 (9th Cir. 1977)	29
United States v. Chadwick, 433 U.S. 1 (1977)	25, 26
United States v. Church, 490 F.2d 353 (9th Cir. 1973)	27
United States v. Cohn, 472 F.2d 290 (9th Cir. 1972)	27
United States v. Connolly, 479 F.2d 930 (9th Cir. 1973)	27
United States v. Majourau, 474 F.2d 766 (9th Cir. 1973)	29
United States v. Mallides, 473 F.2d 859 (9th Cir. 1973)	30
United States v. Patterson, 492 F.2d 995 (10th Cir. 1974)	30

TABLE OF AUTHORITIES cont.

Cases	Pages
United States v. Ritter, 540 F.2d 459 (10th Cir. 1976)	36
United States v. Strickler, 490 F.2d 378 (9th Cir. 1973)	29

STATUTES

18 U.S.C. § 922(h)	3
18 U.S.C. § 924	3
21 U.S.C. § 841	2
21 U.S.C. § 841(a)(1)	3
21 U.S.C. § 846	3
28 U.S.C. § 455	35
28 U.S.C. § 1254(1)	3

CONSTITUTION

U.S. Constitution, Amendment IV	4
U.S. Constitution, Amendment V	4
U.S. Constitution, Amendment VI	5

OTHER AUTHORITIES — Page

Canon 3, Code of Judicial Conduct — 41

Wright, Miller & Cooper, Federal Practice and Procedure Section 3542 — 36

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Alfred E. Azhocar, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 16, 1978.

OPINION BELOW

The Court of Appeals rendered its Opinion affirming the conviction of Petitioner on June 16, 1978. On September 6, 1978, the Court denied a Petition for Rehearing and rejected a suggestion for Rehearing en banc. A copy of the Opinion of June 16, 1978, and the Order denying a rehearing of September 6, 1978, are attached as Appendix "A" and Appendix "B" respectively.

JURISDICTION

On June 16, 1978, the Court of Appeals entered judgment affirming the convictions of Petitioner Alfred A. Azhocar for conspiracy to import heroin and cocaine, a violation of 21 U.S.C. § 841, possession of cocaine with intent to distribute, a violation of 21 U.S.C.

§ 841(a)(1), and possession of a firearm by a convicted felon, a violation of 18 U.S.C. §§ 922(h), 924.

Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court by Title 28, United States Code, section 1254(1).

QUESIONS PRESENTED FOR REVIEW

1. Did the trial court erroneously deny Petitioner's motions to suppress evidence by finding that there was probable cause to stop and search the vehicle driven by Patricia Azhocar?

2. Did the trial court commit prejudicial error by failing to recuse itself after stating at the outset of the proceedings that it would not believe Petitioner under any circumstances?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be searched.

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

> without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF FACTS

References to the Clerk's Record on Appeal will hereafter be cited as "C.R." followed by the appropriate page number. References to the Reporter's Transcript on Appeal in 16 volumes will be cited as "R.T."

followed by the appropriate volume and page number.

Petitioner and codefendant Geronimo Gutierrez-Sanchez were held in custody throughout the district court proceedings in lieu of bails of $300,000 and $200,000 respectively. On October 8, 1976, Gutierrez-Sanchez had a bail review hearing before the Honorable Gordon Thompson, Jr. Gutierrez's counsel filed with the court the affidavit of Petitioner indicating that Petitioner would testify concerning Gutierrez's innocence at a separate trial for Gutierrez if Petitioner was severed and tried first. This affidavit had been previously filed on October 5, 1976. [R.T. Vol. II, page 87]. [C.R. page 257]. Speaking in reply to counsel's request that the court read the affidavit the court stated:

THE COURT: And frankly, to be truthful with you, I wouldn't care what Mr. Alfredo Azhocar said in an affidavit. I wouldn't believe him if he said on a stack of Bibles. Call it what you will. That's the facts.

Now, a jury might and that's a very good reason for not waiving the jury and I would encourage you not to. And I'm sure Mr. McCabe [Petitioner's trial counsel] knows me better than to waive a jury in this case, but to be truthful with you, to exonerate your client by Alfred Azhocar is not the way to go. I think that man is going to hurt you more than he's going to help you.

MR. GOLDBERG: Well, there's nothing else, your Honor. That's the point. It's just . . .

THE COURT: Well, if nobody else convicted your client, Mr. Azhocar probably would just by his testimony for him, . . .

[R.T. Vol. II, pages 87-88].

On October 12, 1976, prior to the hearings on various other motions, Petitioner and Gutierrez moved the court to disqualify itself on the grounds that the court had previously expressed bias and prejudice against Petitioner. The court summarily denied the motion. [R.T. Vol. III, page 110].

The first motion to be taken up was the motion to suppress evidence filed by Petitioner and the other defendants. [R.T. Vol. III, page 111]. Petitioner filed an affidavit alleging ownership of two vehicles that were searched by narcotics agents. [R.T. Vol. III, page 119]. The Government then presented evidence to the effect that both cars were registered to someone other than Petitioner. [R.T. Vol. III, pages 126-127]. The court then ruled that the affidavits were insufficient and Petitioner

would be required to testify in order to establish standing in his motion to suppress.

Petitioner testified that he owned both the 1971 Ford and the 1968 Cadillac. [R.T. Vol. III, page 150]. He purchased both vehicles with his own money and had given the Cadillac to Patricia Azhocar, his cousin, to use at his direction. The car was purchased about four months prior to October 12th. The Cadillac was registered in Patricia Azhocar's name for convenience. On cross-examination, and over objection by Petitioner's counsel, Petitioner was asked if the car was purchased for Patricia Azhocar to haul narcotics in, and Petitioner replied, yes. [R.T. Vol. III, page 153]. Again over objection of Petitioner's counsel, Petitioner testified that he gave the 1971 Ford to Patricia Azhocar to use during a

time a shipment of dope came in. [R.T. Vol. III, page 157]. Petitioner's testimony convincingly established his ownership and dominion and control over the cars. [R.T. Vol. III, pages 159-162], accordingly, the trial court ruled that Petitioner had standing to suppress the evidence seized from the car.

The following testimony was heard on the issue of probable cause to stop and search the vehicle that Patricia Azhocar was driving on July 27, 1976. Surveillance agents had seen Miss Azhocar driving a black over maroon Cadillac meet with Refugio Salazar-Garcia (a "documented" narcotics offender and D.E.A. fugitive) at a Big Boy's Restaurant in Tijuana. This meeting took place on July 23, 1976, four days before the stop of Patricia's car. [R.T. Vol. IV, page 359]. Agents had

determined that Petitioner and his wife were living at 551 11th Street, Imperial Beach, California. The agents knew that Petitioner had been convicted previously of a state narcotics offense and that he had been seen in the company of Gutierrez-Sanchez in a vehicle which was driven by Sanchez near an apartment near the Hotel Conquistadore in Tijuana. [R.T. Vol. IV, page 359]. Petitioner was seen to get out of the car enter a blue van and go to the residence of Francisco Lizzaraga-Ozuna, (another "documented" narcotics offender) leave that residence and go to the residence of Refugio Salazar-Garcia. There was also evidence of a series of phone calls between the house allegedly belonging to Gutierrez-Sanchez on Darby Street in Spring Valley, the Hotel Conquistadore in Tijuana, and Petitioner's house in Imperial Beach.

Agents began surveillance of the Petitioner's home at about twelve o'clock on July 27, 1976. At 4:25 Patricia Azhocar was observed to arrive in the same black over maroon Cadillac she had been seen four days previously in Mexico. [R.T. Vol. IV, page 360]. She entered the residence. Several minutes later she exited the residence, opened the trunk and removed a package. She then took the package back into the house. [R.T. Vol. IV, page 361]. At approximately 5:25 Patricia left the house carrying a large box which she placed in the trunk of the same vehicle and drove away. [R.T. Vol. IV, page 361].

At this point D.E.A. Agent Cuevas decided to have her followed. Unmarked D.E.A. vehicles followed her for about twenty-five minutes. Patricia realized she was being followed and ultimately

drove into the K-Mart shopping center in Chula Vista where she was immediately surrounded by marked local police vehicles. [R.T. Vol. IV, pages 366-368]. Patricia was removed from the Cadillac and one of the uniformed police officers who had effected the stop at the request of D.E.A. agents searched and found contraband in the trunk. [R.T. Vol. IV, page 368]. The agents had decided to stop the vehicle prior to the time Patricia Azhocar pulled into the parking lot as they felt she was aware of their surveillance since they were "sticking right on her bumper." [R.T. Vol. IV, page 374]. After finding contraband in the trunk of the car, a search warrant was obtained for a search of Petitioner's residence in Imperial Beach, and the search of a 1971 Ford.

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD ISSUE WHERE THE COURT OF APPEALS HAS UTILIZED INCORRECT FACTS TO REACH A FINDING, AND IN SO DOING, HAS IMPROPERLY EXTENDED THE MOVING VEHICLE EXCEPTION TO SUSTAIN A WARRANTLESS SEARCH.

The Court of Appeals recited several factors in arriving at the finding that "abundant probable cause existed" to justify a warrantless search of the automobile driven by Patricia Azhocar. A perusal of the factors relied upon by the Court of Appeals reveals several basic misconceptions of the evidence before the trial court.

First, the Court of Appeals found that Petitioner had told a Drug Enforcement Administration informant that he (Petitioner) was purchasing narcotics from Gutierrez,

a known drug trafficker. (Appendix A, page 4). The testimony of the government agents in the trial court reflects that such information was not imparted until after the search of the vehicle, sometime during business hours the following day, and that it had actually been provided by a state narcotics official's informant. [R.T. Vol. V, pages 54, 544]. In fact, government counsel conceded that the information had not been received by the searching government agents until after the arrest of Gutierrez on the following day. [R.T. Vol. VI, page 566]. It is axiomatic then that such a factor could not have been utilized by the government agents prior to stopping the Patricia Azhocar vehicle on the preceding day. That such information may have been known to the government when a later warrant was

sought, cannot relate back under any theory to create probable cause for the search of the automobile on July 27th.

Petitioner sought a Rehearing in the Court of Appeals, contending, among other things, that the Court had incorrectly assumed certain facts. In its Order denying the Petition for Rehearing, the Court also amended its Opinion. Instead of finding that Petitioner had boasted of purchasing narcotics from a drug trafficker, Gutierrez, (See Appendix A, page 2), the Court changed its Opinion to recite that Petitioner was observed by D.E.A. agents meeting with Gutierrez and two other D.E.A. fugitives on several occasions. (See Appendix B, page 2). The amendment to the opinion still miscontrues the evidence before the district court. Gutierrez, a codefendant at trial, was acquitted at the close of

the Government's case pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The evidence in the trial court simply did not show that there had been several meetings; at best, it showed one possible occasion where a meeting could have occurred.

Secondly, the Court of Appeals found as a factor known to the searching agents, the existence of certain telephone toll records from a phone at the former purported residence of Petitioner to an apartment in Tijuana, Mexico. Allegedly, Petitioner and two indicted codefendants had been seen together near that apartment months earlier. (Appendix A, page 2). In fact, the evidence before the trial court revealed that between May and July, 1976, during the period of government surveillance of the indicted defendants, one of them, Gutierrez, was seen at the apartment in

Mexico, but not in the presence of Petitioner, other codefendants, or Patricia Azhocar, the driver of the vehicle ultimately searched. [R.T. Vol. V, pages 433-435. Further, there was no evidence before the trial court that any questionable toll calls had been placed to the Mexico apartment from the place where Petitioner resided at the time of the search, or that Petitioner himself had made any such calls.

Thirdly, the Court of Appeals observed that the automobile driver, Patricia Azhocar, was seen talking with Salazar, a "D.E.A. fugitive", in Tijuana on July 23, 1976, four days before the stop, search, and seizure in question. However, no illegal conduct was observed by surveilling agents and no evidence was presented that any illicit transaction occurred or was observed by an agent.

Nevertheless, the act of those two people innocently meeting is a fact which the Court of Appeals declared gave rise to an inference four days later that Patricia Azhocar was then transporting contraband. (Appendix A, page 4).

In essence, the Court of Appeals accumulated a series of independent, innocent activities, coupled those activities with inferences of illicit conduct, and then implicitly found that the agents reasonably believed Patricia Azhocar was a courier of narcotics. Such a finding was improper in light of the fact that there was no evidence of any illicit activity on the July 23rd meeting between Patricia and Salazar, the fact that there was a lack of any surveillance of Patricia Azhocar preceding her arrival at the residence of Petitioner and during the four

day interim, the lack of any knowledge that Petitioner was in fact at the residence upon the arrival and departure of Patricia, and the lack of any specific or articulable knowledge that the bag and box carried to the residence from Patricia's automobile trunk contained any contraband.

The Court's finding that Patricia was in the residence of Petitioner for an hour (the evidence shows that it was about 20 minutes [R.T. Vol. IV, pages 360, 361, 365, 401-403, Vol. IX, page 810]) is indicative of the Court's misconception of the facts.

Also, interesting to note is the observation at fn.2 of the Court of Appeals' Opinion, to wit, that at the trial of Petitioner, following pre-trial motions to suppress, evidence was adduced that Petitioner had directed Patricia to deliver

narcotics to him at the surveilled residence. This after-the-fact evidence cannot sustain the apparent finding that the officers' hunch at the time of the search was a correct one.

Perhaps the most significant factor to the Court of Appeals in its assessment that probable cause existed to search the vehicle was that upon exiting Petitioner's residence, Patricia Azhocar drove in an erratic and evasive manner, when followed by unmarked surveillance vehicles. (Appendix A, page 4). The testimony of the case agent is crucial to the setting. Agent Cuevas testified that "we made it quite obvious she was under surveillance. We were sticking right on her bumper . . ." [R.T. Vol. IV, page 374]. The subjective intent of the agent is of paramount importance. When Patricia was observed to

depart the residence, Cuevas issued orders to have the vehicle stopped. When queried about the purpose for stopping the car, Cuevas replied:

> Well, hopefully, it was going to be an aid to me in this continuing investigation, and that, hopefully, the police officers would come up with more information for me to support my search warrant that I was trying to get for the vehicle.
>
> [R.T. Vol. IV, page 375].

The agents were aware that Patricia might mistake a stop by one of them in unmarked cars as a "robbery attempt or masher incident or rip off," hence the request to city police officers in marked patrol units to effect the stop. [R.T. Vol. IV, pages 374-375]. One of the assisting agents told the police to stop her on a ruse, indicating that he wanted

the vehicle stopped on the pretense that it was a stolen vehicle which possibly contained stolen arms. [R.T. Vol. V, page 454]. When Patricia pulled into the shopping center parking lot, she was immediately corralled bv several marked police units, escorted from the car by an officer wielding a shotgun, handcuffed, and placed in the rear of a patrol unit. Shortly thereafter, a city narcotics officer who had volunteered to assist, obtained the keys to the trunk, conferred with government agents, and then opened the trunk and removed a bag containing narcotics while government agents watched from a distance in other areas of the parking lot.

The Court of Appeals observed that under the circumstances of this case, abundant probable cause existed to believe that a delivery of narcotics was taking

place. Such a finding flies in the face of the apparent state of mind of the agents participating in the surveillance, who, even after the seizure from the car, and the ensuing interrogation of Patricia Azhocar, proceeded to seek the issuance of a search warrant for the residence. [R.T. Vol. IV, page 404]. Clearly, then, the stop and search of the vehicle was premised on mere suspicion and hunch.

In broad-brush fashion, the Court of Appeals cites Chambers v. Maroney, 399 U.S. 42 (1970), and apparently declares that the existence of seemingly exigent circumstances, coupled with the "facts" then perceived, brought the instant situation within the purported "moving vehicle exception" to the warrant requirement.

Petitioner respectfully contends that the necessary "facts" are lacking.

Further, although this Court has denoted a distinction between homes, offices, and automobiles as they concern the Fourth Amendment, automobiles are nevertheless "effects" within its ambit. Cady v. Dombrowski, 413 U.S. 433, 439 (1973), and Chambers v. Maroney, supra, at page 52. Neither of those decisions however establish an automobile exception to the warrant requirement. See, Preston v. United States, 376 U.S. 364 (1964).

This Court's treatment of automobiles has been based in part on their inherent mobility, which often makes a judicial warrant impracticable. United States v. Chadwick, 433 U.S. 1 (1977). So, notwithstanding the lack of any danger of the removal of the vehicle or the destruction of evidence, certain warrantless searches of vehicles have been upheld.

See, Cady v. Dombrowski, supra, at pages 441-442; South Dakota v. Opperman, 428 U.S. 364, 367 (1976); United States v. Chadwick, supra.

However, a perusal of its previous holdings should demonstrate to this Court totally distinguishable, factual contexts. The instant case is clearly neither an inventory inspection or a safety check, nor can it be paralleled to the "search incident to arrest" which was delayed until the stationhouse as in Texas v. White, 423 U.S. 67 (1975). The prior decisions of this Court have made it clear that in nearly all instances where there is no reasonable likelihood that the automobile could or would be moved, the "automobile exception" is irrelevant. See, dissenting opinion, Cady v. Dombrowski, supra, at page 451, citing Coolidge v.

New Hampshire, 403 U.S. 443, 461 (1971), and Carrol v. United States, 267 U.S. 132, 156 (1924).

With several government agents and more than three local police vehicles surrounding the Patricia Azhocar vehicle, the likelihood of its removal was extremely remote. Obviously, the search cannot be sustained under the border search exception. Almeida-Sanchez v. United States, 433 U.S. 266 (1973). Likewise inapplicable is any purported argument for the application of the plain view doctrine. Harris v. United States, 390 U.S. 234 (1968). The only basis upon which the search in the instant case can be upheld is through a finding of probable cause coupled with exigent circumstances. As noted previously, the theory of probable cause is badly marred by the incorrect portrayal of the

evidence. Further, to conclude that the government agents had inadequate opportunity to secure the vehicle and proceed to apply for and obtain a warrant from a magistrate is inherently unreasonable.

In conclusion, Petitioner respectfully submits that the Court of Appeals failed to follow its own prior decisions in reaching the judgment it did in this case. See, United States v. Connolly, 479 F.2d 930 (1973) and cases cited therein; and, United States v. Cohn, 472 F.2d 290 (1970); cf. United States v. Church, 490 F.2d 353 (1973) [concurring opinion, Judge Duniway].

The Court of Appeals in the instant case cited Chambers v. Maroney, 300 U.S. 42 and a single decision from a different panel of the Ninth Circuit some seven years after Chambers, United States v. Abascal,

564 F.2d 821, 828 as precedent to uphold the validity of the search. By relying on erroneous factual findings, the Court below arrived quickly at the conclusion that probable cause existed. Even assuming arguendo, that the factual findings recited in its opinion were accurate, the Court disregarded its holdings in prior cases where more substantial facts were present and yet the searches were held illegal and not founded on probable cause. See, e.g. United States v. Strickler, 490 F.2d 378; United States v. Majourau, 474 F.2d 766; Plazola v. United States, 291 F.2d 56.

The evidence before the lower courts in this case reveals little more than a generalized suspicion among the government agents, based upon Patricia Azhocar's associations with a fugitive four days earlier, that the containers taken from

and returned to her trunk contained narcotics. Objective facts must be present, not a police officer's intuitive hunch. See, United States v. Mallides, 473 F.2d 859, 862, fn.5 and cases cited therein. What the officers thought and believed is indicative of their good faith; however, what they knew at the time of the detention and search was not even the equivalent of the "series of superficially innocent activities" cited in United States v. Patterson, 492 F.2d 995 (9th Cir. 1974) as a basis for upholding a warrantless search. All evidence derived from the illegal search of Patricia should have been suppressed.

II

A TRIAL COURT THAT STATES ITS PREDISPOSITION NOT TO BELIEVE AN ACCUSED WHO APPEARS BEFORE IT FOR THE FIRST TIME SHOULD NOT THEREAFTER PRESIDE OVER THE CASE. UNDER THE CIRCUMSTANCES, THE TRIAL JUDGE ERRED IN FAILING TO RECUSE HIMSELF RESULTING IN MANIFEST UNFAIRNESS TO PETITIONER.

In holding that the trial judge properly denied Petitioner's motion to recuse, the Court of Appeals recited three requirements that must be met before an affidavit of bias is legally sufficient. The Court held:

> It must state facts which if true fairly support the allegation that bias or prejudice stemming from (1) an extrajudicial source (2) may prevent a fair decision on the merits. The focus is not only on the source of the facts and their distorting effect on a decision on the merits,

as required by Grinnell, but also on (3) the substantiality of the support given by these facts to the allegation of bias, as required by Berger.

Appendix A, pages 9-10.

Here again, the Court of Appeals made an erroneous conclusion, to wit, that the trial court had read "everything that had been filed at the time the remark had been made," thus attributing the bias as judicial rather than extrajudicial. (Appendix A, page 10). Neither Petitioner nor the Government had filed any evidentiary documents at the time the district court judge made the improper remarks. The record below will reflect only that an indictment naming Petitioner had been returned and possibly a search warrant had been read by the trial judge. There had been no significant proceedings before the

trial court, and the court had read only the accusatory pleadings of the Government, not even Petitioner's affidavit. No agency investigative reports, grand jury testimony, or other material had been considered by the judge. [R.T. of Gutierrez's Bail Review Hearings, October 7-8, 1976, pages 54-62].

Therefore, the conclusion by the Court of Appeals that the trial court's bias was not from an extrajudicial source is wholly without support in the record below. As such, the Court of Appeals either substituted, or perhaps provided its own version of what actually occurred in the mind of the trial court.

The Court of Appeals, in stating that the trial judge's remarks were "ill-advised and not condoned," swept aside the fair import of those remarks and concluded that the remarks were not a reflection of

the judge's disposition towards Petitioner. (Appendix A, pages 8, 10). In so doing, the Court engaged in speculation about the trial judge's state of mind, something Petitioner was not permitted to do in his motion to recuse. Petitioner's contention regarding the source of the trial court's bias was summarily labeled "conclusory" because Petitioner did not aver why he believed the source to be extrajudicial. (Appendix A, page 11). One wonders how the scope of review was perceived by the Court of Appeals.

Assuming arguendo, that the Court below properly found that the Affidavit of Petitioner was insufficient and that the trial court's consideration of it was appropriate, what is patently clear is that neither court followed the mandate of 28 U.S.C. § 455. That section provides,

in pertinent part, as follows:

> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

The present section 455 was enacted as a measure to stem the growing dissatisfaction with the former satutory standards and was intended to "broaden and clarify the grounds for judicial disqualification." Act of Dec. 5, 1874, Pub. L. No. 93-512, § 1, 88 Stat. 1609.

The stated aim of the drafters of the amendment to section 455 was:

> . . . to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's

> impartiality, he should disqualify himself and let another judge preside over the case. (emphasis added)
>
> 1974 H.R. REP. No. 1453, 93d Cong., 2d Sess 5.

The grounds for disqualification of judges under section 455 include the grounds set forth in 28 U.S.C. § 144; and, the two should be construed in similar fashion. Davis v. Board of School Commissioners, 517 F.2d 1044 (5th Cir. 1975); United States v. Ritter, 540 F.2d 459 (10th Cir. 1976); see also, Wright, Miller & Cooper, Federal Practice and Procedure, section 3542.

The mandate of section 455(a) is self-activating, whereas the same motion made under the purview of section 144 requires a substantial showing, and the adherence to certain procedural criteria

by a moving party. It is respectfully submitted that certiorari should issue so that this Court can give the courts of the United States a guideline to follow in the above regard, that does not vary. In the instant case, the trial court should have recused itself pursuant to the language of section 455a, but instead examined its apparent predisposition only under the section 144 language which is more narrow.

When the language and remarks made by the trial judge were called to his attention by Petitioner's motion to recuse, the proper course of action would have been to transfer the case to another judge. Even though the trial judge may honestly not have felt himself to be biased. certainly the appearance of a bias was manifest to him. As this Court observed in In re Murchison, 349 U.S. 133, 136

(1955), quoting from an earlier decision in Offutt v. United States, 348 U.S. 11, 14 (1954) ". . . to perform its high function in the best way 'justice must satisfy the appearance of justice'." (emphasis added).

The affidavit filed by Petitioner in the trial court stated:

> ALFRED E. AZHOCAR, being first duly sworn, deposes and says as follows:
>
> (1) I am the defendant in the above entitled action.
>
> (2) Although I was not personally present at the hearing of my codefendant, GERONIMO GUTIERREZ-SANCHEZ, on October 8, 1976, I have been advised by my counsel that certain remarks were made by the HONORABLE GORDON THOMPSON, JR., indicating a predisposition and prejudgment on his part concerning my case.
>
> (3) Specifically, the HONORABLE GORDON THOMPSON, JR. has a personal bias and prejudice against me.
>
> (4) During the hearing of motions relative to my codefendant's bail on

> October 8, 1976, and without having seen me except for brief court appearances, and without having been called upon to pass upon my credibility, I am advised that Judge THOMPSON said in form and substance:
>
> (a) That he would not believe anything I testified to;
>
> (b) That if the only evidence offered in the case of GERONIMO GUTIERREZ-SANCHEZ was my testimony, that my testimony in and of itself, would be enough to convict my codefendant; and,
>
> (c) No matter what I say, the Judge would not believe me.
>
> (5) Although I do not know the specific language that the Judge utilized, I am further advised and believe that Judge THOMPSON has stated, in form or in substance, that if I am convicted of the charges in the indictment, that I will receive the maximum sentence.
>
> (6) I am compelled to state matters in this affidavit on advisement and belief because I was not personally present at the hearing and have not reviewed a transcript of the proceedings.

> A transcript of the proceedings has been requested from the official Court Reporter. By reference, I specifically incorporate the transcription of that proceeding when received as a part of my affidavit. I therefore request leave to supplement this affidavit upon receipt of such transcript, should that supplemental information be deemed necessary by the Court.
>
> (7) I am filing this affidavit in what I believe to be timely fashion in light of the fact that I learned of the bases for this affidavit late October 8, 1976, following the hearing referred to above.

Still another precept imposed a duty on the trial judge to excuse himself from further participation in the instant case. That precept is embodied in Canon 3C(1) of the Code of Judicial Conduct for United States Judges developed by the

Judicial Conference of the United States. Canon 3C imposes a duty upon a judge to examine whether his decision to sit on a case may present even an appearance of impropriety, and as such, establishes a more stringent standard than the Congressional enactments. Canon 3C provides in pertinent part:

> A judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned
> . . .

In recusing himself in the case of Public Utilities Commission v. Pollak, 343 U.S. 451 (1952), Justice Frankfurter declared:

> The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.
>
> Id. at page 467.

Here, the poorly-chosen words of the trial judge, announcing that he would not believe the Petitioner "on a stack of Bibles" and admonishing Petitioner's counsel of the hazards of a jury waiver, signaled an atmosphere of hostility and distrust which culminated with the imposition of two ten-year terms of imprisonment for Petitioner to serve consecutively. The "ill-advised remarks" were extraneous to the matter then before the court and were spoken prior to the judge receiving any evidence or information about either the facts of the case or the persons accused.

Interestingly, the Court of Appeals actually appears to base its affirmance upon the truth of the assertions in the affidavit, thus disregarding the mandate of Berger v. United States, 255 U.S. 22 (1922), which it denotes as the seminal

decision. In Berger, supra, allegations that a judge was prejudiced against defendants because of their foreign birth were held sufficient to warrant disqualification. If a trial court, prior to the commencement of any meaningful proceedings, announces his predisposition about an accused's credibility and flatly states he will not believe his testimony under any circumstances, the test of Berger is certainly appropriate. Petitioner respectfully submits that his affidavit in the instant case recites facts and reasons that at a minimum, "give fair support to the charge of a bent of mind that may prevent or impede partiality." Berger, supra, 255 U.S. at 33-34. (emphasis added). Where, as here, a reasonable question arises concerning a judge's impartiality, he should recuse himself.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

DATED: 9-25-78

Respectfully submitted,

Frederic L. Link

FREDERIC L. LINK
Attorney for Petitioner
ALFRED E. AZHOCAR

APPENDIX A

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ALFRED ESTEBAN AZHOCAR, Defendant-Appellant.	NO. 76-3737 OPINION
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ALFRED ESTEBAN AZHOCAR, Defendant-Appellant.	NO. 77-3187

Appeal from the United States District Court for the Southern District of California.

Before: CHAMBERS and CHOY, Circuit Judges, and FERGUSON,* District Judge.

CHOY, Circuit Judge:

* The Honorable Warren G. Ferguson, United States District Judge for the Central District of California, sitting by designation.

In the first part of a bifurcated trial, a jury convicted Alfred Esteban Azhocar of conspiracy to import heroin and cocaine, a violation of 21 U.S.C. § 841, and of possession of cocaine with intent to distribute, a violation of 21 U.S.C. § 841(a)(1). Later, in a jury-waived trial using the evidence adduced at the preceding trial, he was found guilty of possession of a firearm by a convicted felon, a violation of 18 U.S.C. §§ 922(h), 924.

Azhocar appeals all judgments on the same grounds: first, that there was no probable cause for the police to stop and search the car driven by Patricia Azhocar; and second, that the trial judge should have recused himself because of personal bias and prejudice against the appellant. We affirm the judgment of the district court on both issues.

I. Facts and Proceedings Below

Appellant Azhocar, a convicted felon under California drug laws, was one of several suspected narcotics dealers under surveillance by the Drug Enforcement Agency (DEA) beginning in January, 1976. DEA agents observed him at various times in both Mexico and California with Geronimo Gutierrez-Sanchez, whom the DEA knew as a narcotics trafficker,[1/] and with Refugio Salazar-Garcia and Francisco Lizzarga-Ozuna, both DEA fugitives. During the course of the surveillance Salazar introduced a DEA informant to Gutierrez, after which they discussed smuggling multi-ton quantities of marijuana into the United States from Mexico. Appellant also told another DEA informant that he was purchasing narcotics from Gutierrez. Telephone billing records showed a series

of calls between appellant's house in California and locations in Tijuana where appellant, Gutierrez and Salazar had been seen together.

In July, 1976, Patricia Azhocar, who was formerly married to appellant's cousin, was seen driving to a meeting with Salazar in Tijuana. Four days later, agents watching appellant's house in California saw Patricia arrive in the same car she had driven to Tijuana. She went into the house, returned to the car, removed a large bag from the trunk, and reentered the house. An hour later, she left the house carrying a box and a bag under her arm, placed them in the car's trunk, and drove away.[2/] DEA agents in an unmarked car followed her. Realizing she was being followed, Patricia drove erratically for about twenty-five minutes

before parking in a shopping center. Uniformed police officers then stopped her, searched the car's trunk, and found a quantity of cocaine.

Following later questioning at the DEA office, Patricia voluntarily and knowingly consented to a search of the spare tire of the car, which contained three and one-half pounds of cocaine, and of another vehicle containing three pounds of cocaine and three pounds of heroin.

Based on Patricia's information, a search warrant was issued for appellant's house which led to the seizure of marijuana, cocaine, and heroin, over $100,000 in cash, a .12 gauge shotgun, a military-type M-1 carbine, a loaded .38 snub-nosed revolver, a rifle, and drug paraphernalia.

At trial, appellant moved to suppress the evidence from all the searches

as the product of the allegedly illegal initial search of the car Patricia was driving. He testified to his ownership of the car, thus establishing standing to challenge the search. The district court denied the motion.

II. Probable Cause for the Initial Search

While warrantless searches are generally unreasonable, such searches of moving vehicles have often been approved because justified by exigent circumstances: the vehicle is mobile, its driver is alerted, and its contents may not be found again if a warrant is required. See Chambers v. Maroney, 399 U.S. 42, 51 (1970). Thus, in United States v. Abascal, 564 F.2d 821, 828 (9th Cir. 1977), we stated that under the moving vehicle exception, all that is required to stop and search an automobile

on the highway is probable cause to believe that it contains any type of contraband.

In applying this standard to the initial search, all facts known to the officers and all reasonable inferences that could be drawn from these facts prior to the stop and search must be considered. United States v. Martin, 509 F.2d 1211, 1213 (9th Cir.), cert. denied, 421 U.S. 967 (1975); Rodgers v. United States, 267 F.2d 79, 85 (9th Cir. 1959). The issue is a factual one, turning on the circumstances in each case.

The officers could reasonably have inferred from the totality of facts known to them that Patricia was transporting contraband at the time they stopped her. DEA agents knew from a reliable informant that appellant, a convicted drug felon,

had stated he was purchasing narcotics from Gutierrez, a known drug trafficker; they knew that there had been telephone calls from appellant's residence to locations in Tijuana where he, Salazar and Gutierrez had been seen together; they saw Patricia speak with Salazar, a DEA fugitive, in Tijuana; they observed as she delivered a large bag to appellant's house, and returned with a box and bag which she placed in the trunk of her car; and they saw her take evasive action when followed. These particular circumstances provided abundant probable cause to believe that a delivery of narcotics was being made. There was no error in denying appellant's motion to suppress.

III. Recusal

Prior to his first trial, Azhocar

moved to have the trial judge recuse himself pursuant to 18 U.S.C. § 144.[3/] This statute provides for the assignment of a new judge where a party to the proceeding makes a showing of the present judge's personal bias or prejudice in a timely and sufficient affidavit. Judge Thompson, the trial judge; held that Azhocar's affidavit of bias was legally insufficient, and refused to recuse himself. On appeal, Azhocar urges that this refusal was erroneous on four grounds.

A. Assignment of § 144 motion to another judge for hearing. According to appellant, the statutory command that once a timely and sufficient affidavit is filed the trial judge "shall proceed no further" with the case must be interpreted to mean that the judge cannot even rule on the

sufficiency of the affidavit. The only issue the judge can decide, Azhocar argues, is whether or not the affidavit is timely made. Thus, appellant concludes that Judge Thompson's failure to assign the § 144 motion to another trial judge for a hearing was error.

This contention is without merit. Berger v. United States, 255 U.S. 22, 32-34 (1922), is the seminal case interpreting the bias statute. There, the Supreme Court held that the judge against whom an affidavit of bias is filed may pass on its legal sufficiency because, inter alia, "the reasons and facts for the belief the litigant entertains are an essential part of the affidavit and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." Id. at 33-34. Only after the legal sufficiency

of the affidavit is determined does it become the duty of the judge to "proceed no further" in the case. United States v. Montecalvo, 545 F.2d 684, 685 (9th Cir. 1976); Curry v. Jensen, 523 F.2d 387, 388 (9th Cir.), cert. denied, 423 U.S. 998 (1975), rehearing denied, 423 U.S. 1081 (1976); Undersea Engineering & Construction Co. v. ITT Corp., 429 F.2d 543, 545 (9th Cir. 1970). This is consistent with the language of the statute itself, which makes a timely and sufficient affidavit prerequisite to recusal.

Moreover, since the inquiry is addressed to the facial sufficiency of the affidavit--not to the truth or falsity of the facts stated therein, see United States v. Montecalvo, 545 F.2d at 685--the proposed "hearing" is unnecessary.

Finally, we note that while the

statute undoubtedly permits referring the disposition of an affidavit of bias to another judge, see Tenants and Owners in Opposition to Redevelopment v. Department of HUD, 338 F.Supp. 29, 31 (N.D. Cal. 1972), the adoption of such a procedure as a general rule would be unwise. Reference of § 144 motions to another judge would be cumbersome and would further delay an already slow judicial process. And as observed in United States v. Mitchell, 377 F.Supp. 1312, 1315-16 (D.D.C. 1974), "[o]nly the individual judge knows fully his own thoughts and feelings and the complete context of facts alleged." This is a valid consideration, since inquiry into the circumstances surrounding the presumptively true allegations is often appropriate in determining whether they are such as would prevent a fair decision on the merits.4/

See, e.g., Los Angeles Trust Deed & Mortgage Exchange v. SEC, 285 F.2d 162, 176 (9th Cir. 1961) ("a thorough reading of the record" did not substantiate the affiant's position).

Accordingly, we conclude that Judge Thompson's consideration of the sufficiency of the § 144 affidavit was proper.

B. Rulings adverse to appellant. Appellant claims that certain rulings by Judge Thompson during the course of the proceedings showed bias. Appellant does not directly attack these rulings as constituting an abuse of discretion, and his argument that they support a claim of statutory bias fails on two grounds.

First, no timely and sufficient affidavit stating these claims was ever

filed. Appellant's failure to follow these procedural requirements therefore defeats his charge of bias. United States v. Anderson, 561 F.2d 1301, 1302-03 (9th Cir. 1977).

Second, even if these claims now made on appeal had been included in a timely § 144 affidavit, they would be insufficient to satisfy the statute. Adverse rulings do not constitute the requisite bias or prejudice of § 144. Berger v. United States, 255 U.S. 22, 34 (1921); Ex parte American Steel Barrel Co., 230 U.S. 35, 43-44(1913); Chessman v. Teets, 239 F.2d 205, 215 (9th Cir. 1956), vacated on other grounds, 354 U.S. 156 (1957); Beecher v. Federal Land Bank, 153 F.2d 987, 988 (1945); cert. denied, 328 U.S. 871, rehearing denied, 329 U.S. 819 (1956); In re Equitable Trust Co., 232 F. 836, 840

(9th Cir. 1916).

There is thus no merit to appellant's claim of bias based on adverse rulings.

C. Statements at bail hearings. In his § 144 affidavit, Azhocar stated that Judge Thompson demonstrated bias and prejudice in his remarks at one of co-defendant Gutierrez's bail hearings. According to Azhocar, Judge Thompson, in considering an affidavit made by Azhocar in support of Gutierrez's motion for bail reduction, said that he would not believe anything Azhocar testified to, that Azhocar's testimony in and of itself would be enough to convict Gutierrez, and that Azhocar would not be believed no matter what he said.

While Judge Thompson 's actual remarks[5/] were ill-advised, and are not

condoned, we believe his denial of appellant's motion for legal insufficiency of the affidavit of bias was proper.

United States v. Grinnell Corp., 384 U.S. 563, 583 (1966) and Berger v. United States, 255 U.S. 22, 23 (1922), are the leading cases interpreting the bias statute. Grinnell held that "[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." (emphasis added.)

In Grinnell, Judge Wyzanski had stated: "Maybe you will persuade somebody else. And if you think so, all right. I just assure you it is a great ceremonial act, as far as I am concerned." The Supreme Court emphasized that "any adverse attitudes

that Judge Wyzanski evinced toward the defendants were based on his study of the depositions and briefs," and that taken in context, his statement was "merely a terse way" of ruling on evidence after the lawyer had gotten on his nerves.

Berger, as noted supra, held that the judge against whom an affidavit is filed may pass upon its legal sufficiency because, among other reaons, it is an essential prerequisite to recusal that the facts alleged "give fair support" to the charge that the judge's attitude is one "that may prevent or impede impartiality of judgment." 255 U.S. at 33-34. He may not, however, pass on the truth or falsity of the facts alleged. He can properly deny the affidavit for insufficiency if the facts, taken as true, do not provide fair support for the contention that statutory

bias exists. Id. at 35.

Thus, to be legally sufficient, the affidavit must meet three requirements. It must state facts which if true fairly support the allegation that bias or prejudice stemming from (1) an extrajudicial source (2) may prevent a fair decision on the merits. The focus is not only on the source of the facts and their distorting effect on a decision on the merits, as required by Grinnell, but also on (3) the substantiality of the support given by these facts to the allegation of bias, as required by Berger.

We believe Azhocar's affidavit is legally sufficient on each of these three grounds. First, there is simply no evidence in the affidavit that Judge Thompson's statement was based on an extrajudicial source. Azhocar's contention that the

judge had not seen him previously except for brief court appearances is only minimally relevant to this point. As this Circuit noted in United States v. Montecalvo, 545 F.2d 684, 685 (9th Cir. 1976), a district judge may rely on facts contained in reports properly brought to his attention in the performance of his judicial duties as the basis for his remarks. Here the record supports the Government's claim that Judge Thompson had read everything that had been filed in the case at the time the remark was made.

Second, in context, Judge Thompson's statement was simply an indication of the weight he would give Azhocar's testimony at the time of Gutierrez's bail hearing based on what he then knew. The remarks were made at Gutierrez's fifth bail review hearing, and Gutierrez was depending on

Azhocar's affidavit to prevail. The remarks simply reflect Judge Thompson's inclination not to reduce Gutierrez's bail on the basis of an exculpatory affidavit by co-defendant Azhocar. They do not indicate that Judge Thompson would close his eyes and ears to other evidence later in Azhocar's trial bearing on Azhocar's credibility, or his guilt or innocence.

Third, Azhocar's claim that Judge Thompson's statement could not have "conceivably come from the judge's participation in the case" is conclusory. It does not indicate why the source is believed to be extrajudicial or what it might have been. Since Judge Thompson's remarks appear likely to have been based on information properly brought to his attention in the performance of his judicial duties,

Azhocar's claim is insufficiently substantiated to support an allegation of statutory bias.

D. "Maximum sentence" statement. Azhocar also claimed in his affidavit that Judge Thompson stated that if convicted of the charges in the indictment, Azhocar would receive the maximum sentence. According to the affidavit, this claim was based on "advisement and belief" because Azhocar was not present at the bail hearing where the statements were allegedly made, and he did not have a transcript of the proceedings. The affidavit, however, specifically incorporates the transcript of the hearing.[6/] As a result, the affidavit does no more than allege the actual statements in the record as facts constituting personal bias and prejudice. Since the transcript reveals

no such statement, we must conclude from a reading of the affidavit as a whole that the "maximum sentence" statement is not asserted as a fact therein.

Even accepting the statement as a fact asserted in the affidavit, however, the assertion shares a common legal deficiency with the allegation concerning Judge Thompson's other statements at the bail hearing: there is no basis for a conclusion that the source of the alleged statement was extrajudicial. Thus, pursuant to Grinnell, this allegation is insufficient to show the personal bias or prejudice requisite under § 144.

IV. Conclusion

Since we find that there was probable cause for the initial search of appellant's car, and since Judge Thompson properly determined that the affidavit of

bias was insufficient, the judgments of the district court are

AFFIRMED.

Footnotes

1. [reference on page 3]

Among other things, the DEA was aware that Gutierrez was currently charged in Mexico with tax evasion involving millions of dollars made through narcotics dealings.

2. [reference on page 4]

Evidence at trial revealed that appellant set up the meeting between Patricia and Salazar in Tijuana, that appellant directed her to deliver a package of cocaine to his house in California, and that while she was inside his house he weighed out and repackaged a portion of it, instructing Patricia to take the remaining cocaine with her.

3. [reference on page 9]

18 U.S.C. § 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and

shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

[reference on page 12]

See Berger v. United States, 255 U.S. 22, 33 (1922) and Part III B. infra.

5. [reference on page 15]

THE COURT: And frankly, to be truthful with you, I wouldn't care what Mr. Alfredo Azhocar said in an affidavit. I wouldn't believe him if he said on a stack of Bibles. Call it what you will. That's the facts.

Now, a jury might and that's a very good reason for not waiving the jury and I would encourage you not to. And I'm sure Mr. McCabe knows me better than to waive a jury in this case, but to be truthful with you, to exonerate your client by Alfred Azhocar is not the way to go. I think that man is going to hurt you more than he's going to help you.

MR. GOLDBERG: Well, there's nothing else, your Honor. That's the point.

It's just . . .

THE COURT: Well, if nobody else convicted your client, Mr. Azhocar probably would just by his testimony for him, . . .

6. [reference on page 21]

The affidavit stated in part as follows:

> I am compelled to state matters in this affidavit on advisement and belief because I was not personally present at the hearing and have not reviewed a transcript of the proceedings. A transcript of the proceedings has been requested from the official Court Reporter. By reference, I specifically incorporate the transcription of that proceeding when received as a part of my affidavit.

APPENDIX B

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ALFRED ESTEBAN AZHOCAR, Defendant-Appellant.	NO. 76-3737 ORDER
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ALFRED ESTEBAN AZHOCAR, Defendant-Appellant.	NO. 77-3187

Appeal from the United States District Court for the Southern District of California.

Before: CHAMBERS and CHOY, Circuit Judges, and FERGUSON,* District Judge.

*The Honorable Warren Ferguson, United States District Judge for the Central District of California, sitting by designation.

On June 29, 1978, appellant Azhocar filed a petition for rehearing with a suggestion for rehearing en banc.

The panel as constituted in this case has voted to amend the opinion filed June 16, 1978 as follows: (All references are to the slipsheet opinion.)

1. At page 1894, column 2, lines 13-15: [see Appendix A, page 3, line 16] Delete the sentence "Appellant also told another DEA informant that he was purchasing narcotics from Gutierrez." and substitute therefore the following:

> On several occasions DEA agents had observed appellant, a convicted drug felon, meeting with Gutierrez, who was known to be a major drug trafficker, as well as with two other DEA fugitives.

2. At page 1894, column 2, lines 19 and 20: [see Appendix A, page 4,

line 4] Put a period after "seen" and delete "together."

3. At page 1895, column 2, lines 19-23: [Appendix A, pages 7-8] the phrase which begins with the words "DEA agents" and substitute therefor the following:

> DEA agents knew that appellant, a convicted drug felon, had been meeting with Gutierrez and with two other drug traffickers;

4. At page 1895, line 27: [Appendix A, page 8, line 6] Delete "together".

With the opinion so amended, the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the proposed amendments, and of the suggestion for rehearing en banc, and no judge has requested a vote on the

suggestion for rehearing en banc. Fed.R. App.P. 35(b).

It is ordered that the opinion in this case is amended as set forth above; the petition for rehearing is denied and the suggestion for rehearing en banc in rejected.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
)ss.
COUNTY OF SAN DIEGO)

CRYSTAL WALLS, being first duly sworn, says:

That affiant is a citizen of the United States, over 18 years of age, a resident of and employed in the County of San Diego, State of California, and not a party to the within action.

That affiant's business address is 303 West "A" Street, San Diego, California, 92101.

That affiant served the attached Petition for Writ of Certiorari by placing two (2) true copies in an envelope addressed to the following:

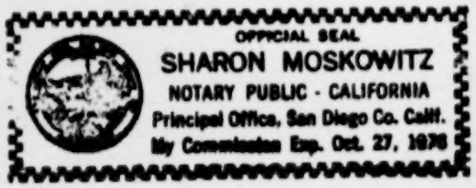
Robert H. Bork,
Solicitor General
Department of Justice
10th & Constitution Avenue
Washington, D.C. 20530

Said envelope was thereafter on September 25, 1978, deposited in the United States mail at San Diego, California.

Crystal Walls

Subscribed and
Sworn to before
me this 25th day of
September, 1978.

Sharon Moskowitz
Notary Public in and for
said County and State


OFFICIAL SEAL
SHARON MOSKOWITZ
NOTARY PUBLIC - CALIFORNIA
Principal Office, San Diego Co. Calif.
My Commission Exp. Oct. 27, 1978

Supreme Court, U.S.
FILED
JAN 5 1979
MICHAEL RODAK, JR., CLERK

No. 78-524

In the Supreme Court of the United States

OCTOBER TERM, 1978

ALFRED E. AZHOCAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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PHILIP B. HEYMANN
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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	6
Conclusion	14

CITATIONS

Cases:

Berger v. *United States*, 255 U.S. 22	12
Carroll v. *United States*, 267 U.S. 132	8
Chambers v. *Maroney*, 399 U.S. 42	9
King v. *United States*, 576 F.2d 432	13
Rakas v. *Illinois*, No. 77-5781 (December 5, 1978)	9
Scott v. *United States*, 436 U.S. 128	7
United States v. *Burke*, 506 F.2d 1165, cert. denied, 421 U.S. 915	10
United States v. *Chadwick*, 433 U.S. 1	9
United States v. *Clark*, 559 F.2d 420	8
United States v. *Grinnell Corp.*, 384 U.S. 563	12
United States v. *Lovasco*, 431 U.S. 783	13
United States v. *McConnell*, 500 F.2d 347	10
United States v. *Ortiz*, 422 U.S. 891	8
United States v. *Rodriguez-Alvarado*, 510 F.2d 1063	8
United States v. *Wolfson*, 558 F.2d 59	13

Statutes: Page

18 U.S.C. 922(h) 2
18 U.S.C. 924 2
18 U.S.C. 4205(b)(2) 2
21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2
28 U.S.C. 144 ..... 11, 13
28 U.S.C. 455 13

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-524

ALFRED E. AZHOCAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 581 F.2d 735.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1978. A petition for rehearing was denied on September 6, 1978. A petition for a writ of certiorari was filed on September 27, 1978. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence seized in a warrantless search of the car driven by petitioner's cousin should have been suppressed.

2. Whether the trial judge erred in denying petitioner's motion that he recuse himself.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of conspiracy to import, possess and distribute heroin and cocaine, in violation of 21 U.S.C. 846, and possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to two consecutive 10-year terms of imprisonment followed by a lifetime special parole term. After a bench trial based on stipulated facts derived from the narcotics conspiracy trial, petitioner was found guilty of receipt of a firearm by a convicted felon in violation of 18 U.S.C. 922(h) and 924 and sentenced to five years' imprisonment under 18 U.S.C. 4205(b)(2), the sentence to run con-

[1] Count I named Olivia Azhocar-Angulo, Norma Williamson, Thomas Reyes, Geronimo Gutierrez-Sanchez, and Refugio Salazar-Garcia as petitioner's co-conspirators. Olivia Azhocar's severance motion was granted by the trial court. Gutierrez-Sanchez was acquitted by the trial court, and Reyes and Williamson were acquitted by the jury. Salazar-Garcia has not yet been tried.

currently with that imposed for the narcotics convictions.[2]

The government's evidence showed that DEA agents began surveillance in January 1976 of a group of narcotics dealers in Mexico and the border areas of California. Petitioner, who had previously been convicted of narcotics offenses in state court, was one of the suspected dealers who was placed under surveillance (Tr. 343-346). During the federal investigation, petitioner was seen with Gutierrez-Sanchez, a known narcotics trafficker who maintained residences both in Mexico and California (Tr. 344, 346-349, 356-359, 398, 430). Petitioner was also seen with Salazar-Garcia and Lizzaraga-Ozuna, both of whom were being sought on federal drug charges (Tr. 356-359). During this same period, Salazar-Garcia introduced a DEA informant to Gutierrez-Sanchez so that they could discuss the possibility of smuggling narcotics into the United States (Tr. 355).

In the course of this investigation, government agents reviewed the billing records for petitioner's home telephone, which revealed calls to Gutierrez-Sanchez's apartment in Mexico (where petitioner had been seen with Gutierrez-Sanchez) to Gutierrez-Sanchez's residence in California, and to a hotel in Tiajuana where Gutierrez-Sanchez had stayed (Tr. 358). Government agents also learned that Mexican authorities had charged Gutierrez-Sanchez with evad-

[2] After this conviction, four additional counts that charged similar offenses were dismissed at the government's request.

ing the taxes on millions of pesos earned from the sale of narcotics (Tr. 364-365).

On July 23, 1976, DEA agents in Mexico observed Patricia Azhocar, petitioner's cousin by marriage, meet with Salazar-Garcia (a known associate of Gutierrez-Sanchez) in a black-over-maroon Cadillac (Tr. 373, 449, 497). On the same day petitioner was seen in the parking lot of Patricia's apartment building (Tr. 366, 373-374).

On July 27, at about noon, agents began surveillance of petitioner's residence in Imperial Beach, California, about four miles from the Mexican border (Tr. 346, 360-362, 364, 389). During the next four hours, the agents observed a number of individuals arrive in automobiles, enter the residence, and leave (Tr. 360). At approximately 4:25 p.m., Patricia arrived at petitioner's house driving the same Cadillac she had been driving when she met with Salazar-Garcia in Mexico (Tr. 360, 401). Patricia entered the house for a short time, then returned to the car, removed a large package from the trunk, and reentered the house (Tr. 360-361, 401-402). About 20 minutes later she left the house carrying a box and a bag, placed those items in the trunk, and drove away (Tr. 360, 402-403).[3] The law enforcement officers followed.

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[3] While Patricia was in petitioner's house, one of the agents left to seek the assistance of an Assistant United States Attorney in obtaining a warrant to search the Cadillac (Tr. 366, 386, 403-404).

After she had driven a short distance, Patricia began to drive erratically in an apparent attempt to evade the surveilling officers (Tr. 375-376, 445, 453-454). During this time, Agent Williams spoke to the Chula Vista police concerning the circumstances of their investigation and requested that the local police stop Patricia on the ruse that they believed that the car had been stolen and that it contained firearms (Tr. 367, 454). After about 25 minutes of driving in circles, Patricia parked the car in a store parking lot. Several Chula Vista policemen pulled up behind Patricia, asked her to step out of the car, and conducted a search of the car that uncovered a box and bag containing three kilograms of cocaine, cutting agents, and a scale (Tr. 368, 456, 478-479).

Patricia cooperated with government agents, giving consent for a search of another car and her apartment (Tr. 494-496, 508). The agents found three pounds each of heroin and cocaine in the second car (Tr. 1012-1013, 1017). A later warrant-authorized search of petitioner's house yielded quantities of heroin, marijuana, and cocaine, $4,900 in cash, and numerous firearms (Tr. 915-920, 946-948, 955-956, 993-996). Approximately $100,000 in cash was discovered hidden behind a panel in the trunk of petitioner's car, which was parked in the adjoining garage (Tr. 169, 961-962, 1003).

Prior to trial, petitioner moved to suppress the evidence seized from the Cadillac driven by Patricia Azhocar. Although Patricia was the registered owner of the car, petitioner testified that he was the true

owner and that he had permitted Patricia to use it to carry and store narcotics (Tr. 150-151, 154). He stated that he had given Patricia the money to purchase the car and pay for its registration, and that he told her to register the car in her own name (Tr. 150-152, 154, 158). The district court ruled that petitioner had established standing to challenge the search (Tr. 162). The court concluded that there was probable cause for the search of the vehicle, and that the "fastbreaking" circumstances justified proceeding without a warrant, since the car was parked in a public place and there was a danger that conspirators might try to destroy any evidence in the car (Tr. 724-725). Accordingly, petitioner's motion to suppress the evidence discovered in the car was denied.

Patricia Azhocar testified as a prosecution witness at trial (Tr. 1090-1221), and the evidence seized from the Cadillac, as well as the drugs, money, and firearms seized at petitioner's home, were introduced into evidence.

ARGUMENT

1. a. Petitioner contends (Pet. 14-30) that the search of the Cadillac was unsupported by probable cause and that the evidence discovered as a result of the search should have been suppressed. This contention is without merit. Since this case involves only the application of settled principles to the facts of this case, it does not present an issue warranting review by this Court. Moreover, as the court of appeals correctly concluded (Pet. App. 8), there was "abundant probable cause to believe that a delivery of narcotics was being made" by Patricia Azhocar and that the narcotics were in her automobile.[4]

A six-month investigation encompassing surveillance in both the United States and Mexico had revealed that petitioner, himself a convicted narcotics dealer, was associating with other known traffickers in Mexico. Telephone toll records provided additional evidence of petitioner's communications with other members of the conspiracy. Informants provided information that Gutierrez-Sanchez was arranging the movement of large quantities of narcotics from Mexico to the United States, and investigators suspected that petitioner was involved. A few days after she was seen talking with Salazar-Garcia in Mexico, petitioner's cousin, Patricia Azhocar, visited petitioner's house. She was driving the same automobile in which she had met Salazar-Garcia. Based upon the information gained in their investigation, when the agents observed Patricia carry a package into petitioner's house and return shortly thereafter to the car with two other packages, they drew the inference that she was assisting petitioner in the importation and distribution of narcotics and that the packages

[4] Petitioner also attacks the search (Pet. 22-23), on the ground that one of the agents requested that local police stop Patricia's car on the pretense that they believed the car was stolen and that it contained guns. However, since the federal agents had probable cause for the search, the subjective state of mind of the individual officers is not relevant. See *Scott* v. *United States*, 436 U.S. 128, 138 (1978).

in her car contained narcotics. Patricia's evasive driving maneuvers when she noticed that she was being followed provided strong corroboration for the agents' conclusions. As the district court observed (Tr. 724), "her desperate efforts to elude the agents and her activity in so doing changed what may well have been an innocent or strong suspicion into probable cause." See *United States* v. *Rodriguez-Alvarado*, 510 F.2d 1063, 1064 (9th Cir. 1975).

Petitioner argues (Pet. 19-20) that the activities outlined above were innocent in themselves and that the agents' actions were premised "on mere suspicion and hunch" (Pet. 24). But even though individual actions, viewed in isolation, may appear to be innocent, the probable cause determination turns on "the totality of the circumstances and the inferences that flow therefrom." *United States* v. *Clark*, 559 F.2d 420, 424 (5th Cir. 1977). "[T]he officers are entitled to draw reasonable inferences from these facts in light of their knowledge of the area and their prior experience * * *." *United States* v. *Ortiz*, 422 U.S. 891, 897 (1975).

b. Alternatively, assuming that there was probable cause, petitioner urges (Pet. 27-28) that there was no justification for conducting the search without first obtaining a warrant. He implicitly recognizes that the agents could not leave the automobile unsecured in the public parking lot because of the danger that Patricia would drive off and elude them, or that the co-conspirators might empty the car of evidence. See *Carroll* v. *United States*, 267 U.S. 132,

153 (1925). But he argues that the agents could have guarded Patricia and the car until a warrant was secured, and that "[w]ith several government agents and more than three local police vehicles surrounding the Patricia Azhocar vehicle, the likelihood of its removal was extremely remote" (Pet. 27).

It is well settled that when an automobile is stopped in a public street or parking area on the basis of probable cause, the police may search it immediately rather than detaining it while they seek a search warrant. *Chambers* v. *Maroney*, 399 U.S. 42, 51 (1970). See *United States* v. *Chadwick*, 433 U.S. 1, 14 n.8 (1977).[5]

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[5] Moreover, although the court of appeals did not consider this point, even if the search of the car had been improper, suppression would not have been required because petitioner had no constitutionally protected privacy interest in the car.

The district court based its conclusion that petitioner had standing to challenge the legality of the search on his testimony that he had provided Patricia with the money to purchase the car, and that he was the true owner of the vehicle although it had been registered and licensed in Patricia's name. As this Court explained in *Rakas* v. *Illinois*, No. 77-5781 (December 5, 1978), the only persons entitled to challenge the legality of a search are those whose constitutionally protected expectations of privacy have been violated. Petitioner's testimony that he had provided the money to purchase the car so that Patricia could use it to store and transport narcotics for him did not establish that he had a legitimate constitutionally protected expectation of privacy in the vehicle. Petitioner admitted that he had only driven the car on two or three occasions and that Patricia generally kept the car at her apartment and had its use (Tr. 159). Since petitioner allowed Patricia to purchase the car, register it in her own name, and have it under her control from day to day, the fact that he had provided the purchase price so that the car

2. Petitioner also contends (Pet. 31-43) that the trial judge erred in refusing to recuse himself. During a pretrial hearing on a motion to reduce Gutierrez-Sanchez's bail, Gutierrez-Sanchez argued that the government's case against him was so weak that he had little incentive to flee (Tr. 79-81). In support of that argument, he offered an affidavit in which petitioner averred that if he were tried first, he would then testify at Gutierrez-Sanchez's trial and exculpate him (Tr. 84-85). The trial judge denied the motion, stating that he had "reviewed this case and all of the pleadings in the case and I have got to say to be truthful with you, that I think [Gutierrez-Sanchez is] going to run" (Tr. 83). The trial judge also stated that although he had not seen petitioner's affidavit, "frankly, to be truthful with you, I wouldn't care what [petitioner] said in an affidavit. I wouldn't believe him if he said on a stack of bibles" (Tr. 87). The court then cautioned Gutierrez-Sanchez's counsel about resting his defense on petitioner's testimony, stating that as a witness petitioner "is going to hurt you more than he's going to help you" (Tr. 88).

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would be available to carry narcotics did not allow him to claim a legitimate expectation of privacy. See *United States* v. *McConnell*, 500 F.2d 347 (5th Cir. 1974) (defendant who permitted and paid for rental of car for co-defendant not entitled to challenge search); cf. *United States* v. *Burke*, 506 F.2d 1165 (9th Cir. 1974), cert. denied, 421 U.S. 915 (1975) (defendant who claimed he had paid for van that was registered in his brother's name held entitled to challenge search because his frequent use gave him a legitimate expectation of privacy).

Shortly thereafter, petitioner filed a motion pursuant to 28 U.S.C. 144 [6] for recusal on the grounds that the trial judge's comments demonstrated bias against petitioner.[7] After a hearing the trial judge denied the motion, ruling that "I know whether or not I'm prejudiced against somebody or I'm not, and I think I'm the only one who does know that, and I'm certainly not prejudiced against anybody" (Tr. 109). He also emphasized that petitioner was being tried by a jury, and that his own role in the trial of the case would be a limited one, since it was his policy not to comment on the evidence, to question witnesses, or otherwise to take an active role at trial (Tr. 109-110).

The court of appeals concluded (Pet. App. 15) that the trial judge's remarks at the bail hearing had been "ill-advised, and are not condoned," but it affirmed the denial of the recusal motion on the grounds that petitioner had not established any extrajudicial source of prejudice, nor shown that the judge

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[6] 28 U.S.C. 144 provides in pertinent part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

[7] Petitioner's affidavit also alleged on information and belief that the judge had stated he intended to impose the maximum sentence permitted if petitioner was convicted. The transcript demonstrated that the judge made no such remarks (see Pet. App. 21-22), and petitioner does not now rely on that allegation.

would be affected by his initial assessment of petitioner's credibility and "close his eyes and ears to other evidence" (Pet. App. 19-21).

Petitioner apparently concedes that disqualifying prejudice must stem from an extrajudicial source, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *Berger* v. *United States*, 255 U.S. 22, 23 (1921), but he urges (Pet. 33) that "the conclusion by the Court of Appeals that the trial court's bias was not from an extrajudicial source is wholly without support in the record below," because the only materials filed at that time were "the accusatory pleadings of the government."

The record provides no support for this contention. At the hearing on Gutierrez-Sanchez's bail, the district judge stated that he had reviewed everything filed so far in the case (Tr. 83, 87). He indicated that he had carefully gone over the records of Gutierrez-Sanchez's three prior bail review proceedings before the magistrate, another district judge, and the court of appeals (Tr. 83-84, 87; R. 1, 14, 16).[8] Additionally, on September 22, 1976, the government had filed two factual affidavits describing the evidence against petitioner and Gutierrez (R. 128-131). The court of appeals correctly concluded that petitioner had provided no reason to believe that the trial judge's opinion of petitioner's credibility was not based upon the record in the case before him, and accordingly that he was not required to recuse himself.

[8] "R." refers to the record filed in the court of appeals.

Petitioner also argues (Pet. 34-40) that the district court erred in failing to consider his recusal motion in light of 28 U.S.C. 455, which, he contends (Pet. 36), is "self-activating" and requires less substantiation than a motion under Section 144. Petitioner based his motion solely on Section 144, and he never urged either court below to consider his claim under Section 455. Since this claim was never advanced in the courts below, it is not a proper basis for review by this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, there is no reason why the result would be any different under Section 455 than under Section 144, since Section 455 did not eliminate the extrajudicial source requirement for disqualification based on bias or prejudice. See *King* v. *United States*, 576 F.2d 432, 437 (2d Cir. 1978); *United States* v. *Wolfson*, 558 F.2d 59, 62 (2d Cir. 1977). Accordingly, petitioner's motion to disqualify Judge Thompson was properly denied under any statutory test.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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